(11)

No. 95 - 2024

In The
Supreme Court of the United States
October Term, 1996

C. MARTIN LAWYER, III,

Appellant,

v.

UNITED STATES DEPARTMENT
OF JUSTICE, *et al.*,

Appellees.

On Appeal From The United States District Court
For The Middle District Of Florida

REPLY BRIEF FOR APPELLANT

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26 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

OTHER AUTHORITIES

A. THE APPELLEES THEMSELVES TOLD THE DISTRICT COURT THAT THE FLORIDA LEGISLATURE MUST ENACT THE REMEDIAL PLAN.

All of the cases of this Court regarding redistricting presume that a state legislature is not required to act until a federal court adjudicates the existing apportionment unconstitutional. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). In the present case, because the District Court did not adjudicate District 21 unconstitutional, the need for the State officials to convene the legislature was not triggered.

That the District Court understood that such an adjudication was necessary to trigger legislative action is evident from the fact that at the October 26, 1995 status conference Appellant stated that the District Court should remand the case to the legislature as the court had done in the *Miller v. Johnson*, 115 S.Ct. 2475 (1995) case. The following colloquy occurred:

> The Court: I think the Governor--didn't the Governor convene the legislature?
> Mr. Lawyer: In Georgia? Yes sir.
> The Court: I think he did. Well, our governor hasn't done that. *I mean he hasn't got a judgment requiring him to do it or the like....*

(R. 166 at 37-38, emphasis added).

Had the Governor reconvened the Legislature, it would have been a special session and Florida Constitution Art. III, Sec. 16 would have been invoked.[1] Appellant does not contend herein that

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1. Contrary to Appellees' argument, in his Jurisdictional Statement, at 18, Appellant specifically mentioned Article III, Section 16 in support of the assertion that the Legislature must adopt a redistricting plan in the same manner as other laws. Additionally, all arguments raised by Appellant herein were made by former State Senator Helen Gordon Davis (R. 147) and fully briefed by the Justice Department. (R. 184 at 11-18).

the role of the Florida Supreme Court is anything other than that delineated in Art. III, Sect. 16.

The Florida House sought to intervene in this case in order to "protect the Legislature's primary role in redistricting in the event that this Court concludes that redistricting is required." (R. 76 at 3, ¶4.). The House told the District Court that "reapportionment is a legislative function. See, Art. III, Sec. 16, Florida Constitution." (*Id.* at 1, ¶ 2.)

Senator Hargrett stated in the District Court as follows:

> ...once a districting plan is declared unlawful by a federal court, the state legislature has the responsibility, and should be given the opportunity to adopt a remedial plan in the first instance....If the Speaker is attempting to have the Florida House intervene at the remedy phase in an effort to short-circuit that process, and to persuade this Court to impose a plan or draw a plan *without giving the members of the Legislature an opportunity to consider the matter*, then the intervention should be denied." (R. 93-94 at 2, ¶ 3.) (Emphasis added).

The Appellees' argument that Plan 386 had the "consent" of state officials and could bypass the legislative process is totally without merit. The Speaker of the Florida House of Representatives filed an affidavit in the District Court stating that he was "authorized" to settle this lawsuit pursuant to House Rule 2.4 which states as follows:

> (c) The Speaker or the Committee on Rules and Calendar may authorize counsel to initiate, defend, intervene in, or otherwise participate in any suit on behalf of the House, a Committee of the House, a Member of the House (whether in the legal capacity of Member or taxpayer), a former Member of the House, or an officer or employee of the House, when such suit is determined by the Speaker to be of significant interest to the House and when it is determined by the Speaker that the interests of the House would not otherwise be adequately represented. (J.A. at 137-138)

Clearly, the aforementioned rule does not give the Speaker the authority to revoke the constitutional authority of the legislature to enact legislation as a body.

Furthermore, contrary to Private Appellees' assertion, the federalism issue was indeed raised before the District Court by none other than the Attorney General of the State of Florida who filed "The Attorney General of Florida's Notice of Significant Legal Issues Pertaining to Judicial Review of the Proposed Settlement Agreement" on September 22, 1995 wherein the Attorney General made the precise arguments and cited the identical cases as has the Appellant in this appeal. (R. 146) The previous objections of the Attorney General raise the obvious question of why the Attorney General, as one of the State Appellees, has abandoned his objections.[2]

Appellant's statement in the pre-trial statement filed prior to the pre-trial conference on November 2, 1995 that "the only issue which should remain for the court to decide at the trial on this matter is the issue of the appropriate remedy" (J.A. at 198) assumed that there would be a trial on the constitutionality of District 21 and that the District Court could consider how much time to give the legislature prior to implementing its own remedy. None of the parties had even mentioned Plan 386 in the pre-trial statement (R. 170) much less agreed that the trial would consider the Plan.

Contrary to Appellees' argument that Appellant told the District Court that it was not required to defer to the legislature, the

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2. Appellant has fully discussed the implication of the "Attorney General's Notice" in Appellant's Response to the Motion of the United States for Divided Argument, wherein Appellant pointed out that under § 16.01(5), Fla. Stat. private counsel does not have the power or authority to speak for the State of Florida in this appeal at oral argument or otherwise.

quotation cited by Private Appellees (Brief, p. 19) is out of context. Appellant Lawyer was objecting at the November 2, 1995 pre-trial conference to the District Court's decision to impose a plan. (R. 171 at 15; see Brief on the Merits for Appellant at 11-12). Appellant's statements were an attempt to remind Judge Merryday of Judge Tjoflat's statement at the September 27, 1995 status conference that the District Court would direct the Florida Legislature to draw a districting plan "rather than to have the Court do it." (R. 159 at 13-14). At the "fairness hearing" on November 20, Appellant repeatedly insisted upon an adjudication of the constitutionality of District 21 (J.A. at 173) and objected to Plan 386 to the point of arousing the ire of Judge Tjoflat. (J.A. at 173, 187, 188). Even the consenting plaintiffs sought such an adjudication as late as November 17, 1995 (R. 187).

Accordingly, the Appellees are precluded from now opposing Appellant federalism arguments and from asserting that such arguments were not presented to the District Court.

B. APPELLEES' CHARACTERIZATION OF THE MEDIATION SESSIONS AND APPELLANT'S PARTICIPATION THEREIN IS INCORRECT.

Once the District Court had submitted the case to mediation, Appellant Lawyer was required to participate to whatever extent that he could in order to protect his interest. By participating in the mediation, he did not waive his right to a trial on the constitutionality of District 21 in the event of the impasse, which he had a right to trigger by objecting to Plan 386.

Under Local Rule 9.07(a) of the United States District Court for the Middle District of Florida, "if the mediation conference ends in an impasse the case will be tried as originally scheduled." (Appendix B to Brief Opposing Motions to Affirm) At the October 26, 1995 status conference the mediator declared an impasse (R. 166 at 8). However, the District Court again committed the action to mediation which produced a settlement plan signed by all parties except Appellant on November 2, 1995. (J.A. at 197).

Because of Appellant's objection to Plan 386 the District Court should have scheduled a trial on Plan 330. Instead, at the pre-trial conference on November 2, the District Court ignored Appellant's objection and the local rule and scheduled a "fairness hearing" on Plan 386. (J.A. at 198). Appellant Lawyer could not have foreseen that the mediation process would lead the District Court to believe that it did not have to adjudicate the constitutionality of Plan 330 or that the District Court would impose a plan which was not properly before it. That the District Court intended to do precisely that was not clear until the November 2, 1995 pre-trial conference when Judge Merryday set the "fairness hearing" to consider Plan 386. Moreover, even if Appellant had foreseen this, there was nothing that he could have done that he did not do.

Appellees' assertion that the mediation sessions were not confidential and that the local rule requiring confidentiality had been waived are contradicted by the record and Appellees' own submissions. Appellant filed a "Motion to Disapprove [September 1, 1995] Settlement Agreement"; and in his Affidavit accompanying the Motion, Appellant stated that he had requested that the mediator declare an impasse because during a private mediation session the Department of Justice "would not agree to any plan *unless* it included significant areas of Pinellas and Manatee counties." (R. 138 at 4, ¶ 10.) (Emphasis in original). In response, Private Appellees complained to the District Court that Appellant had "blatantly violated this Court's confidentiality order by revealing the details of the negotiation process" (R. 144 at 11) and threatened Appellant with monetary sanctions if the Settlement Agreement was rejected. (R. 144 at 12 n.3). The Department of Justice echoed this view. (R. 148 at 2 n.1).

C. THE DISTRICT COURT'S REMEDY WAS INVALID.

In the absence of an admission of liability or an adjudication thereof, the District Court cannot order a remedy. This is because equitable remedies are determined by the nature and scope of the constitutional violation. *Missouri v. Jenkins*, 115 S.Ct. 2038, 2048-2050 (1995). This principle renders the remedy in this case invalid

per se. However, even if the District Court had adjudicated District 21 unconstitutional, it could not have ordered the remedy of Plan 386 because of the well-established requirement that the District Court defer to the state legislature in the first instance.

Contrary to the Private Appellees' argument, the principles of both federalism and separation of powers limit the power of a federal court to interfere with state institutions. *Missouri v. Jenkins*, 115 S.Ct. at 2061 ("What the federal courts cannot do at the federal level they cannot do against the states" citing J. Thomas' concurring opinion therein).

Justice Thomas' concurring opinion in *Lewis v. Casey*, 116 S.Ct. 2174, 2197 (1996), is also directly applicable to this case.

> Principles of federalism and separation of powers impose stringent limitations on the equitable power of federal courts....[T]he Framers never imagined that federal judges would displace state executive officials and state legislatures in charting state policy."

The legislative process in the case at bar was short-circuited because the District Court believed that the mediated settlement agreement relieved it of its obligation to adjudicate the constitutionality of both Plan 330 and Plan 386.

Having ordered the mediation, the District Court then deferred to its outcome based on the fiction that it was the act of the Florida Legislature. In the name of deferring to the state legislature the District Court usurped the legislature's powers. This case represents the union of adjudication and legislation; abdication and usurpation; litigation and mediation. In exercising its equitable power in this manner, the District Court obliterated any distinction between the role of the federal government and that of the state government. The issue is not whether the District Court had the power to "displace" an unconstitutional state law (as Appellees suggest) but whether the District Court had the power to "replace" the law with a product of the District Court's own mediation

process. The remedy imposed by the District Court in this case represents an arrogation of federal judicial equitable power which dwarfs that which was rejected by this Court in *Lewis*.

D. APPELLEES' CHARACTERIZATION OF THE CONSENT DECREE AS AN ADJUDICATION CONTAINING FINDINGS OF FACT IS MERITLESS.

Because the order is invalid per se as a consent order because it did not contain an admission of liability (as Judge Tjoflat realized), the appellees have now attempted to characterize the order as an adjudication on the merits complete with "findings of fact" which they claim are entitled to be affirmed under the clearly erroneous standard. In order to do, so they have characterized the "fairness hearing" as an evidentiary hearing at which Lawyer had the burden to prove Plan 386 was a racial gerrymander. Their argument is without merit.

Contrary to Appellees arguments, the District Court regarded its order as a "hybrid consent decree that disposes of liability by consent and affords a remedy resulting from a partial settlement and an adversary hearing similar to a fairness hearing." J.A. at 207, n.4. This explains why the District Court merely conducted a "limited review" of Plan 386. (J.A. at 207).

Federal Rule of Civil Procedure 52(a) provides that "in actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and should state separately its conclusions thereon...." In this case there was no trial on the constitutionality of either District 21 or Plan 386. Plan 386 had never been the subject of the pleadings or discovery, was not mentioned in the pre-trial statement (R. 76), and was never set for trial. Indeed, Plan 386 was never properly before the District Court

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The "fairness hearing" cannot be characterized as an "evidentiary hearing". When counsel for the Justice Department asked Judge Merryday at the November 2 pre-trial conference whether the "fairness hearing" would be "evidentiary in nature," he

replied as follows: "I assume there is some judge somewhere who simply enjoys hearing evidence. No." (R. 171 at 31). Far from being a trial, the "fairness hearing" did not include the taking of sworn oral testimony as required by Federal Rule of Civil Procedure 43(a). Instead, the affidavit of John Guthrie was introduced, Guthrie was made available for "cross-examination" and the attorneys, including Appellant, argued before the court.

Because there was no trial, the opinion of the District Court contains no findings of fact to which the clearly erroneous standard would apply. Indeed, no findings of fact were made regarding how Plan 386's boundaries were drawn or why the boundaries were selected. The court did not have a map highlighting the racial densities or even depicting the waters of Tampa Bay. The language utilized by the District Court such as "benign" and "satisfactorily tidy" is not of any legal significance; and it is not a proper substitute for a legal analysis of the districting principles which the District Court did not undertake. The district court did not refer to the Guthrie Declaration upon which the Appellees rely herein.

This Court has stated that "there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion." *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422 (1943). "In a gerrymandering case the facts as to how, where and why the legislature drew the boundaries are the heart of the equal protection violation. *Davis v. Bandemar*, 106 S.Ct. 2797, 2832, n.14 (1986) (J. Powell, concurring in part and dissenting in part. The procedure and the order it produced are thus distinguishable from the cases cited by the Appellees.[3]

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3. *Rogers v. Lodge*, 102 S.Ct. 3272, 3274-75 (1982) (following "bench trial at which both sides introduced extensive evidence" the district court "issued detailed findings of fact and conclusions of law..."); *White v. Regester*, 93 S.Ct. 2332, 2339-40 (1973) (district court made specific findings of fact regarding the history of Dallas' multi member district); *Bush v. Vera*, 116 S.Ct. 1941, 1952, 1955, 1957 (n.1), (1996) (district court made "findings of primary fact" following "several days of testimony and

However, even if the clearly erroneous standard did apply in this case, it is obvious that the District Court had a mistaken impression of the applicable legal principles. *Inwood Labs v. Ives Labs*, 456 U.S. 844, 855 n.15 (1982). The District Court proceeded from the erroneous assumption that Plan 386 was properly before it, that it did not have to adjudicate the constitutionality of Plan 330, and that Appellant Lawyer had the burden to prove that Plan 386 was unconstitutional at the "fairness hearing." Because there was no trial scheduled on the constitutionality of Plan 386, and there had been no pleadings or discovery directed at Plan 386, it is absurd to suggest that Plaintiff failed to prove his burden when the matter was never properly before the court.

Because the "fairness hearing" was not evidentiary in nature, it follows that Appellant was not required to appeal Judge Tjoflat's ruling during the "fairness" hearing that Justice Department attorney Mulroy could not be subjected to examination. At the outset of Appellant's comments at the"fairness" hearing, Appellant voiced his intention to call all of the attorneys who had participated in the mediation which produced Plan 386. Lawyer began by calling Mulroy because Appellant related that Mulroy stated at the second phase of mediation that Lawyer's proposed plan (which was not before the District Court and is not before this Court)[4] was inade-

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argument"); *Shaw v. Hunt (Shaw II)*, 116 S.Ct. 1894, 1899 and 1901 (1996) (6 day trial followed by findings which comported with the *Miller* standard); *Johnson v. Miller*, 922 F.Supp. 1552 (S.D.Ga. 1995) on remand from 111 S.Ct. 2475, *prob. juris. noted* 116 S.Ct. 1823 (1996).

4. The District Court invited Appellant to propose a plan. (R. 180 at 27) However, at the "fairness hearing" Judge Tjoflat stated that Appellant's plan was only before the District Court as an objection to Plan 386. (J.A. at 181). Regarding that plan, Appellant now agrees with the Justice Department's contention at page 26 of its Brief that the holdings of *Bush* and *Shaw II* make it clear that such proposal would not be constitutional because its boundaries are not sufficiently compact. Thus, it should not be an issue herein.

quate because it did not contain a sufficiently high percentage of Black voters. (R. 178 at 3.)[5]

Judge Tjoflat refused to permit examination of Mulroy because the Justice Department assured him that Plan 386 emanated from the "state parties." (J.A. at 193). However, in fact, Mulroy admitted at the "fairness hearing" that the Justice Department had participated in "confidential mediation sessions" regarding the configuration of Plan 386. (*Id.*). Indeed, the Department of Justice even paid a share of the expenses of the mediation (R.90 at 2).

Having threatened Appellant with sanctions for exposing the confidential mediation sessions for what they were, Appellees are precluded from arguing that Appellant failed to call the mediator as a witness. Furthermore, a cross-examination of John Guthrie would not have yielded the information regarding the motivation for the design of Plan 386. Guthrie was a technocrat hired by the Senate -- not the State of Florida. (J.A. at 163). The notion that Guthrie was the personification of the State of Florida and the embodiment of the districting policies of the State is ludicrous. Nowhere in Guthrie's declaration is there any hint that any Senator, Representative, or Committee of either house of the Florida Legislature had any input whatsoever in the design of Plan 386.

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5. Appellant's "Motion to Disapprove November 2, 1995 Settlement Agreement" had argued as follows:

> In addition to these very persuasive statistics, there is the statement of Mr. Mulroy, Justice Dept. counsel, that portions of counties other than Hillsborough had to be added to any district acceptable to Justice because the Black percentage of V.A.P. for Hillsborough County alone was too low. The undersigned, thus, respectfully asks the Court to inquire of Mr. Mulroy as to the Justice Department's reason for insisting that any "viable" plan extend beyond Hillsborough County.

R. 178 at 3.

All of this Court's cases refer to the redistricting process as an act of the state legislature--not an expert hired for the purpose of litigation. In short, Plan 386 is not entitled the "presumption of good faith that this Court has accorded legislative enactments." *Miller*, 115 S.Ct. at 2488. Plan 386 was never enacted by the Florida Legislature.

E. NEUTRAL DISTRICTING PRINCIPLES WERE SUBORDINATED TO RACE IN THE DRAWING OF PLAN 386.

Appellees argue that the District Court found that race did not predominate in the drawing of Plan 386. However, the court made no such finding of fact. Instead, the court stated that the Constitution prohibited districting dominated by "the single-minded focus" on race and concluded that there was "no cognizable constitutional objection" to Plan 386. (J.A. at 205).

Because there are no findings of fact in the opinion, Appellees have relied upon the Guthrie declaration for the proposition in support of their contention that there is substantial evidence in the record to support a finding that neutral districting principles were not subordinated to race. However, the law is clear that even where there has been a finding of fact if a reviewing court is convinced if the finding is mistaken, it should reverse the finding even where there is evidence to support it. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

Moreover, the Guthrie declaration does not support Appellees' argument that the Plan 386 observed neutral districting principles. In fact, Guthrie specifically stated in his declaration that, "traditional redistricting principles" were "of a bygone era", and that "the traditional standards (*particularly compactness*) quickly lost relevance in the political arena" during the 1992 districting cycle. J.A. at 27, ¶ 7. (emphasis added).

Instead, Guthrie stated that "technological advances" such as United States Bureau of Census block level data, "geocoded" electronic map information, and "sophisticated computer hardware

and software...gave decision makers unprecedented latitude to custom design and fine tune districts." J.A. at 27, n. 2. This is a code for the fact that, as of 1992, Guthrie could easily identify where the Black voters lived.

Indeed, George Waas, Assistant Attorney General of the State of Florida and counsel for State of Florida in this appeal, has described the 1992 redistricting as follows:

> Because the primacy of racial and ethnic representation mandated by federal law transcended all of the other factors that inhere to redistricting, district compactness took on an "Alice in Wonderland" reality. Odd-shaped, elongated, snake-like, Rorschach-ink blot district lines drawn to accommodate racial and ethnic population patterns were nevertheless deemed compact because these districts--regardless of shape--represented an identifiable community and constituency. The vitality of these odd-shaped districts drawn to accommodate minority representation is suspect as a result of the United States Supreme Court's decision in *Shaw v. Reno*.

Waas, *The Process and Politics of Legislative Reapportionment and Redistricting under the Florida Constitution*. 18 Nova L. Rev. 1001, 1032 (1994).

Despite the "Alice in Wonderland" reality of many districts in Florida, the original 1992 *legislatively*-adopted SJR 2-G District 21 was actually a model of compactness--wholly contained within Hillsborough County. This is clearly shown by the SJR 2-G official map of District 21 and surrounding districts in Appendix A

to this Brief. Guthrie's declaration cleverly omitted a copy of the map of original District 21. However, it is part of the record.[6]

The fact is that, after the Justice Department intruded into the Florida districting process, District 21 went from being remarkably compact (as graphically demonstrated by the map of SJR 2-G — Plan 267 attached as Appendix A hereto) to *extremely* non-compact under Plan 330. Settlement Plan 386 does not even come close to the compactness of SJR 2-G.

In its original opinion approving SJR 2-G, the Florida Supreme Court noted that several opponents of SJR 2-G had contended that "an additional black influence district should have been created" in Hillsborough County. *In Re Constitutionality of SJR 2-G*, 597 So.2d 276, 284 (Fla. 1992). However, the Florida Supreme Court rejected this contention and noted that the NAACP "stated at oral argument that it was not in favor of creating a strong black voting district in Hillsborough County because the community there is not sufficiently compact and does not have sufficiently cohesive interests to create an effective influence district." *Id.* at 284-285.

As is amply discussed in the Brief on the Merits for Appellant, pp. 2-4, the Florida Supreme Court acceded to the Justice Department's demands and approved Plan 330 solely because the Justice Department had withheld approval of SJR 2-G under Sections 2 and 5 of the Voting Rights Act because "there are no districts in which minority persons constitute a majority of the

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6. The map (a black and white version) of SJR 2 is an exhibit to R. 130, filed September 1, 1995, entitled "Response by United States to Plaintiffs' Motion for Summary Judgment". The exhibits to this pleading are contained in a separate "red roper" folder entitled "Exhibits 1-17 to Doc # 130". The map of SJR 2-G is part of Exhibit 3 (yellow cover sheet) entitled "Composite Exhibit: Maps and Statistics of Various Redistricting Plans". The specific map of SJR 2-G is found under a blue cover sheet entitled "Plan 267 — Senate: SJR 2-G", which also contains statistical data for the plan.

voting age population." *In Re Constitutionality of SJR 2-G*, 601 So.2d 543, 547 (Fla. 1992). The entire pre-clearance denial letter is in the record herein. (R.13, Attachment 2) The Florida Supreme Court recognized that the plan was not compact "because in creating a strengthened minority district it is necessary to extend fingers in *several directions in order to include pockets of minority voters.*" *Id.* at 546 (emphasis added).

> Indeed, Justice Overton's dissent stated:
>
> The NAACP expressed its objection to the [Plan 330 configuration] by stating, "This plan's proposed minority district for the Tampa Bay area *lacks geographic compactness*," and that "it places virtually all black residents in the four-county area into the minority district, thereby substantially diminishing the opportunity for blacks to influence elections in the surrounding districts." (Emphasis added).

Id. at 548 (Overton, dissenting).

Despite these serious reservations, the Florida Supreme Court concluded under duress of the Justice Department that "under the law community of interest must give way to racial and ethnic fairness." *Id.* at 546.

It is, therefore, clear that the central feature of Plan 330 (crossing Tampa Bay solely for the purpose of including pockets of Black voters who otherwise would not be included) was effectuated by the Florida Supreme Court in order to satisfy the demands of the Justice Department. As such, the Florida Supreme Court's decision constitutes an explicit assignment of voters on the basis of race in violation of the equal protection clause. *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097, 2105 (1995).

In his Declaration, Guthrie stated that "Compactness was expressly rejected as a formal redistricting standard in 1992. Furthermore, as the maps show..., it was also rejected as a redistricting practice." J.A. at 26, ¶5. However, this was Guthrie's conclusion, not the Florida Legislature's nor the Florida Supreme Court's. Most importantly, it was the position of the Justice Department which the Florida Supreme Court felt compelled to obey in 1992. This explains why Guthrie did not observe traditional districting principles in designing Plan 386.

Instead of complying with such race-neutral principles in the design of Plan 386, Guthrie explained the bizarre configuration of Plan 386 as being "not out of line with the composition and shape of many other legislative districts in Florida." *Id.* The Appellees herein attempt to justify Plan 386 for the same reason as did the District Court — because it is less offensive than Plan 330. J.A. at 207. However, it does not satisfy the United States Supreme Court's equal protection analysis to say that the district in question is "not out of line" with other "Alice in Wonderland" districts.

Regarding the socio-economic data which Appellees have now used *post hac* to justify Plan 386, the District Court did not even refer to this pretextual information much less make a finding of fact based on it. With respect to Guthrie's and Appellees' contention that a body of water does not preclude contiguity, it is one thing for an otherwise sound districting plan to include islands. It is another matter entirely to carve out enclaves from a land mass which would not otherwise be part of a district.

Furthermore, contrary to the Appellees' arguments, the *Miller* decision does not require that a voting district have a majority of black voters in order to offend the Equal Protection Clause. This Court clearly stated that a plaintiff must demonstrate "that race was the predominant factor motivating the legislature's decision to place a *significant* number of voters within or without a particular district." *Miller v. Johnson*, 115 S.Ct. at 2488. In the instant case, Appellant a pointed out (and Appellees do not dispute) that Plan 386 crossed Tampa Bay to include 64.4% of the Black voting age population in Pinellas County and crossed into Manatee County to include 74.8% of that's county's Black voting age

population.[7] Clearly, this represents a *significant number of voters* who were placed within Plan 386 solely because of their race.

As has been stated, the Justice Department has admitted to participating in "confidential mediation sessions" in which the design of Plan 386 was discussed. Although Mulroy denied ever stating in those sessions that "race was the overriding factor in the configuration of District 21 and Plan 386" (J.A. 193), he did not deny that the Justice Department would not approve a plan which did not include "significant portions of Pinellas and Manatee counties." Appellant requested that the District Court ask Mulroy this question in his Motion to Disapprove November 2, 1995 Settlement Agreement (R. 178 at 3; see discussion n.5, *infra*.).

Therefore, instead of being limited to objecting to a plan devised wholly by the State of Florida, the Justice Department was actually dictating the formulation of the plan. Incredibly, the Justice Department even opposed permitting Appellant to represent himself because "if this case were to settle, his status as a separately represented plaintiff would make settlement negotiations that much more complex." (R. 164 at 7). State Appellees have attempted to characterize the process by which Plan 386 was negotiated as the "construction of a district." (State Appellees Brief at 28.) Instead it is clear that Guthrie was taking orders from the Justice Department which never compromised its insistence upon the retention of the central feature of Plan 330 which extended over Tampa Bay "in order to include pockets of minority voters." *In Re Constitutionality of SJR 2-G*, 601 So.2d 543, 546 (Fla. 1992).

It is correct that Plan 386 reduced the percentage of Black voting age population from 45.0% to 36.2% and reduced the number of counties it traversed from four to three. However, the central feature that the Florida legislature and the Florida Supreme Court

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7. The reverse of this is equally dramatic. Only 25.2% of Manatee County's Black voting age population was left out of District 21; and only 35.6% of Pinellas County's Black voting age population was left out.

(but for the Justice Department's insistence) had rejected--crossing Tampa Bay--was retained in Plan 386.

Justice Department attorney Mulroy stated unequivocally at the "fairness hearing" that, "it has been the position of the Florida Senate, the United States and several other parties consistently throughout this case that compactness is not in fact a traditional redistricting principle in Florida." J.A. at 172. The Justice Department confirmed this in its "Motion to Affirm" when it stated at page 5 thereof, "compactness is not a criteria for drawing districts that Florida has regularly followed in the past 20 years..." However, this inaccurate and misleading assertion has been omitted from the Brief on the Merits of the United States.

In the State Appellees' Brief, at page 10, the following statement is made:

> In terms of compactness (*which has been rejected as a Florida districting principle)* the new District 21 is in line with a host of other Florida legislative districts that have no substantial minority population. (Emphasis added).

However, that is not what they told the District Court. At the "fairness hearing" the Florida Senate's counsel stated as follows:

> We then set upon what should be done with District 21 and the surrounding districts. We were constrained by the principles that we understand to be in existence at the time, primarily dealing with *compactness,* contiguity and one person/one vote.

J.A. at 163. (Emphasis added).

The counsel for the Florida Senate proceeded to tell the District Court *eleven* (11) times that Plan 386 complied with the principle of compactness. (J.A. at 163, 164 (4 times), 165, 166 (2 times), 167 (2 times) and 172) Indeed, the map he was referring to (Appendix C to Brief on the Merits for Appellant, p. 3a) falsely

depicted Plan 386 in yellow as a compact land mass despite the fact that it crossed Tampa Bay.

Therefore, it is clear that Plan 386 remains an explicit racial classification because it continues to embody the demand of the Justice Department that significant numbers of voters widely separated by geographical and political boundaries be assigned to Plan 386 on the basis of their race in flagrant subordination to other race-neutral principles. *Shaw v. Reno (Shaw I)*, 113 S.Ct. 2816, 2827 (1993).

F. APPELLEES HAVE FAILED TO REBUT THE APPELLANT'S CONTENTION THAT THE CONTOURS OF FLORIDA SENATE DISTRICT 21 ARE UNEXPLAINABLE IN TERMS OTHER THAN RACE.

The Equal Protection arguments of Appellees, when viewed in their totality, can be characterized as follows:

1. The Supreme Court should not hold the District Court herein to the detailed analysis of compactness, respect for political subdivisions, and natural geographic boundaries which the Supreme Court used in the recent landmark cases of *Miller*, *Shaw II*, and *Bush*.

2. Senate District 21 need not be reasonably compact because Florida has rejected the principle of compactness in redistricting.[8]

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8. As noted above, this argument is totally wrong, factually, as to District 21. As shown by the map appended to this Reply Brief, the 1992 *legislatively*-adopted SJR 2-G — Plan 267 was remarkably compact as to District 21. Also, an examination of the 1982 redistricting maps in the Record in the exhibits to R. 130 will reveal that many of the districts therein, including Appellant's district (then called District 23) were far more compact than the Justice Department-mandated districts.

3. Senate District 21 need not respect political subdivisions because Florida has no history of respecting political subdivisions; and Florida officials have declared it desirable to disrespect political subdivisions. *See*, Brief for State Appellees at 26; Brief for the United States at 20.

4. Senate District 21 need not respect geographic boundaries (contiguity) because Florida has always disrespected geographic boundaries and barriers. *Id.*

Appellant submits, however, that the holdings of the recent landmark cases in no way allow a State to avoid equal protection liability by saying it has a tradition of disrespecting race-neutral principles such as compactness, respect for political subdivisions, or respect for natural geographic boundaries, especially where such disrespect was compelled by the Department of Justice in order to achieve "racial and ethnic fairness." Here, in essence, Appellees concede that Plan 386 has consciously avoided racial *neutrality* as to these factors.

This Court's plurality in *Bush* particularly emphasized the importance of compactness in determining race-neutrality. 116 S.Ct. at 1952, 1958-1959, 1961-1962. Appellees here do not make any pretense that District 21 is reasonably compact "by any objective standard that can be conceived." *Shaw II*, 116 S.Ct. at 1901. Nowhere in any of Appellees' briefs is there any reference to the objective measurements of compactness found in the law review article cited by the *Bush* plurality. Pildes & Niemi, *Expressive Harms, "Bizarre Districts", and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich. L. Rev. 483 (1993).

Thus, appellees have failed to effectively rebut the argument of Appellant that, as in *Bush*, the combined failure to comply with the race-neutral principles of shape, compactness, respect for political subdivisions, contiguity, and *genuine* community of interest, demonstrates that the contours of Senate District 21 are "unexplainable in terms other than race." 116 S.Ct. at 1958.

CONCLUSION

This Court should hold that Settlement Plan 386 (and *a fortiori* Plan 330) is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, reverse the "Final Order" of the District Court which approved Settlement Plan 386, and remand to the District Court for further proceedings consistent herewith. Because the use of mediation tainted the constitutionality of the entire proceeding below, this Court should direct that mediation not be used in further redistricting proceedings. Finally, because of the pervasive behind-the-scenes activity of the Justice Department in this and similar cases, this Court should direct that the Florida legislature should be given the opportunity to act in legislative session to devise a remedial plan and preclude the Justice Department from denying pre-clearance *unless* said plan demonstrably dilutes the voting strength of minorities in Hillsborough County from the legislatively-adopted plan that was lawfully in effect before the 1992 redistricting. Pre-clearance under § 5 of the Voting Rights Act is designed to *prevent vote dilution*, not to *promote enhanced* minority voter percentages. *Miller* at 115 S.Ct. 2493-2494.

Respectfully submitted,

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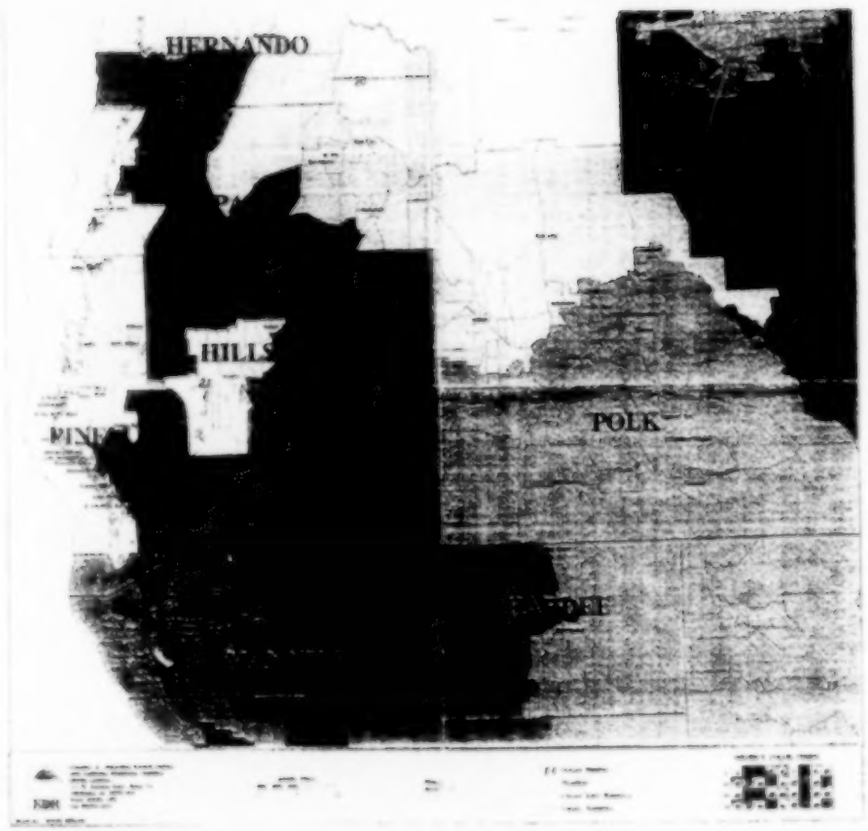

APPENDIX A

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